Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

FRED WILSON, JR., and LAVELL R. HEGWOOD,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under this Court's decision in *Francis v. Franklin*, 471 U.S. 307 (1985), was it *Sandstrom* error for the trial court to give an initial conspiracy instruction omitting the element of intent when the final instruction was legally sufficient, but was not accompanied by an acknowledgment that it represented a correction of the earlier instruction?

2. Did the trial court cure the *Sandstrom* error inherent in the Ninth Circuit pattern instruction on 21 U.S.C. Section 843(b) by following it with language that tracked the statute?

3. Was the admission of evidence of five-year-old drug sales by petitioner Wilson, and of drug use by both petitioners nearly contemporaneous to their arrest, an abuse of discretion under Fed.R.Evid. 404(b)?

4. Was the evidence in this case legally sufficient to sustain petitioners' convictions of conspiracy?

LIST OF PARTIES

At trial, before the United States District Court for the District of Alaska (case number A-90-094-CR), Fred Wilson, Jr., and Lavell R. Hegwood, petitioners herein, appeared as defendants. The United States of America appeared as plaintiff. Before the United States Court of Appeals for the Ninth Circuit, petitioners Wilson (docket number 91-30204) and Hegwood (91-30189) appeared as appellants; the United States of America appeared as appellee.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Fred Wilson, Jr., and Lavell R. Hegwood respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on October 13, 1992. The decision affirmed petitioners' convictions before the United States District Court for the District of Alaska.

OPINION BELOW

The order of the United States Court of Appeals for the Ninth Circuit, dated January 7, 1993, denying petitioners' petition for rehearing and rejecting petitioners' suggestion for rehearing en banc is not reported. This Order is reproduced in the Appendix hereto, p. B-1, *infra.*

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 977 F.2d 492 (9th Cir. 1992), and reproduced in the Appendix at p. A-1, *infra.*

JURISDICTION

Petitioners invoke the Court's jurisdiction to review the decision of the Ninth Circuit pursuant to 28 U.S.C. Section 1254(1).

Petitioners Wilson and Hegwood were convicted in the United States District Court, District of Alaska (Judge James K. Singleton) of conspiracy to distribute cocaine, in violation of 21 U.S.C. Section 841(a)(1) and 21 U.S.C. Section 846; possession of cocaine with intent to distribute, in violation of 21 U.S.C. Section 841(a)(1) and 21 U.S.C. Section 846; and use of the mails to facilitate the possession of cocaine, in violation of 21 U.S.C. Section 843(b). The jury returned verdicts of guilty on March 5, 1991. On May 17, 1991, the district court pronounced its sentences.

Appellant Hegwood filed his Notice of Appeal on May 23, 1991; appellant Wilson, on May 28, 1991. Both appeals were timely filed. The jurisdiction of the United States Court of Appeals rested on 18 U.S.C. Section 3582(b), and Fed.R.App.P. 3 and 4(b).

The United States Court of Appeals for the Ninth Circuit affirmed petitioners' convictions on October 13, 1992. See p. a1, *infra*. The Ninth Circuit denied the petitioners' timely petition for rehearing and suggestion for rehearing en banc by order entered on January 7, 1993. See p. B-1, *infra*.

STATUTES AND RULES INVOLVED

The texts of 18 U.S.C. Section 2, 21 U.S.C. Sections 841(a)(1), 843(b) and 846 and Fed.R. Evid. 404(b) are set forth in the Appendix, B-4, *et seq.*

STATEMENT OF THE CASE

Petitioners Wilson and Hegwood were indicted in the District of Alaska. They were accused of arranging or participating in a postal delivery of cocaine from Los Angeles to Anchorage. The district court's jurisdiction was based on Fed.R.Crim.P. 18.

On November 23, 1990, a Los Angeles postal inspector's interest was aroused by a package addressed to a "Julie Richardson" in Anchorage, Alaska. The inspector notified postal authorities in Seattle and Anchorage, then sent the package on. Anchorage postal inspectors detained the package, obtained a

search warrant and found that it contained cocaine. They substituted plaster of Paris for most of the contraband. Postal Inspector William Skytta donned a letter carrier's uniform, drove to 178 Dean Place (the address on the package) and made a controlled delivery.

Skytta knocked twice at the door, announced "post office," and represented that he had an Express Mail package for delivery. A man (identified by Skytta as petitioner Wilson) opened the door. Skytta said that the parcel was for Julie Richardson. The man said that she was not there now, but would be back later. The inspector asked if an adult at the apartment would be willing to sign for the package. A woman, witness Patricia Brundage, signed with the name "Mary Thomas."

DEA Agent Robert Cayford and Alaska State Trooper William McMillon were parked in a car on a hill overlooking the buildings at 178 Dean Place. McMillon testified that, after the mail truck delivered its package and left the scene, Wilson stepped out the door of the apartment, walked to a BMW, entered the driver's door and started the engine. Shortly after, petitioner Hegwood left the apartment, carrying the parcel. About eight to ten seconds later, Wilson got out of the car and walked back into the common entry of the apartment.

Special Agent Cayford left his car and went toward the apartment building, "where Mr. Wilson was returning to the building from the vehicle." Cayford, clad in raid jacket and baseball cap, chased Wilson, yelling, "police, stop." He caught up to Wilson as Wilson was banging on an apartment door. Cayford, assisted by others, apprehended Wilson and took him inside Apartment 2, where Trooper McMillon patted him down. Cayford saw an "eight ball" (one-eighth ounce of cocaine) removed from Wilson's sock during the pat-down.

Alaska State Trooper Julia Grimes and her surveillance partner, Postal Inspector Hertle, pulled up next to the BMW and contacted Hegwood, who was sitting in the passenger's seat. His hands were in the air, *per* police instructions. In his right hand he held a folding knife. Grimes saw the Express Mail parcel in the BMW's back seat, on the passenger's side, behind Hegwood.

Grimes entered Apartment 2 to search for the woman who had accepted the package. She found her hiding in a closet in the master bedroom. The woman identified herself as Patricia Brundage, said that she had made up the name "Mary Thomas," and that she knew nobody named "Julie Richardson." Trooper Grimes saw cocaine paraphernalia in the apartment.

Brundage agreed to act as a government witness, and charges against her were dropped. At trial, she testified that she had known Wilson for approximately five years, and considered him a friend; and that she knew Hegwood through Wilson. She said that she had left her apartment to go to work at 10:00 a.m. on the morning of November 24, 1990, the day the package was delivered and the arrests were made. Hegwood and Wilson were both present when she awoke, having arrived the night before at around 9:00 or 10:00 p.m. Her roommate, John Sherald, was there as well.

Brundage testified that everyone had sat up the previous night, talking, drinking Courvoisier and smoking cocaine. She could not remember whether Wilson or Hegwood had brought the cocaine, and she had not purchased it on that occasion, but said that she had previously bought it from Wilson. Wilson's counsel's relevance objection was denied. Brundage said that such overnight visits by defendants were frequent occurrences.

When she arrived home from work between 5:30 and 6:00 p.m. that evening, Hegwood was still there. Wilson came later, and he, Hegwood and Brundage went into a bedroom to smoke cocaine. Later, the two men went into the living room. Brundage remained in the bedroom. At some time after that, there was a knock on the door. Wilson called her into the living room, saying that someone was there. The "someone" was Postal Inspector Skytta, who asked if a Julie Richardson lived there. Brundage said no. Skytta

then asked her if she would accept a package. She shook her head, and then someone behind her said, "Patricia, go ahead." On the stand, Brundage said that she did not know and could not remember who directed her to accept the package. She signed, took delivery of the parcel, and put it on a chair by the door. Then she went to the bathroom. When she came out, Hegwood, Wilson and the package were gone. On recross examination, she said that she first approached Wilson about selling her cocaine because she observed people coming in and out of his house.

On February 26, 1991, out of the presence of the jury, the trial court issued a protective order against the United States Attorney's introduction of evidence of petitioners' prior cocaine use in her opening statement, but allowed her to discuss their cocaine use on the day of the arrest in the opening statement.

Witness John Sherald, Brundage's roommate, testified that Wilson and Hegwood visited him at his house on approximately the Wednesday before November 24, 1990. On that occasion, he said, Wilson asked him if Wilson might receive a letter at Sherald's address. The following Saturday morning, Wilson and Hegwood visited him at about 2:00 a.m. According to Sherald, they smoked some cocaine, and Wilson asked him, "what time did the mailman come around." Hegwood told Sherald that the letter contained transcripts regarding Wilson's child custody matter.

According to Sherald, Wilson left the house about 2:00 p.m. Hegwood stayed, and later twice called Wilson to come pick him up. Sherald left for work about 4:55 p.m.

Sherald said that Wilson had asked him on a previous occasion if he could have a friend send some records to Sherald's address, and that he had agreed. He said that he had once picked up a package for Wilson at the post office. He alleged having purchased drugs from Wilson five or six times. He admitted that he had an agreement with the government, and that the government had agreed not to prosecute him in exchange for his testimony.

In its initial charge to the jury, the trial court defined "conspiracy" thus: "Conspiracy requires an agreement between two or more persons to commit a crime, of which either or both defend-

ants become a member, knowing at least one of its objects, and at least one member performed at least one overt act to carry out the conspiracy." This definition omits the element of intent. Because it requires only that "either or both defendants become a member," it invites the conviction of one defendant, even if he did not know the object of the conspiracy, as long as the other did.

The trial court's instruction at the end of trial relied on the Ninth Circuit pattern instructions, and stated the law correctly.

The district court's instruction to the jury regarding 21 U.S.C. Section 843(b) read as follows:

> "In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt. Doubt, that the defendant used the mail to help bring about the conspiracy to distribute cocaine charged in count I of the indictment or that the defendant used the mail to help bring about possession of cocaine with the intent to distribute charged in count II."

This instruction essentially follows the language of the Ninth Circuit pattern instruction. That instruction makes no reference to knowledge or intent.

Immediately after reading the instruction, the trial court added what was essentially a *précis* of the statute: "Section 843(b) of Title 21 of the United States Code provides in part that it shall be unlawful for any person, knowingly or intentionally, to use any communication facility in committing or in causing or facilitating commission of any act or acts constituting a felony."

Neither instruction occasioned an objection.

On March 5, the jury returned verdicts of "guilty" against both Hegwood and Wilson on all counts. Petitioners timely appealed to the Ninth Circuit. On October 13, 1992, the Court of Appeals affirmed petitioners' convictions. On January 7, 1993, it denied petitioners' timely petition for rehearing and suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION ON THE CONSPIRACY INSTRUCTION CONFLICTS WITH THIS COURT'S DECISION IN *FRANCIS v. FRANKLIN*

A. The Ninth Circuit Opinion Distinguishes Unnecessarily Between Initial and Final Instructions.

The government concedes that the district court's opening charge to the jury defining conspiracy omitted the element of intent. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *and see, United States v. Indelicato*, 800 F.2d 1482, 1483 (9th Cir. 1986). This Court has not resolved whether *Sandstrom* error can ever be harmless. *Connecticut v. Johnson*, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983).

Petitioners concede that the district court's final instruction to the jury correctly stated the law. When an opening instruction conflicts with the final instruction, the Ninth Circuit has held that, "because the correct instruction was the only instruction given to the jury to take with them to the jury room, *it is presumed* that the jury follow the correct instruction." *Guam v. Ignacio*, 852 F.2d 459, 461 (9th Cir. 1988), emphasis added. This presumption is supported by no citations to legal precedent.

There is no reason in fact or at law to support such a presumption. In this case, at the beginning of the trial the judge told the jury that the government need prove something considerably short of what the law requires it to prove to sustain a conviction of conspiracy. The jury listened, and interpreted the evidence during trial in light of what the judge had told them. By the trial's end, jurors had obviously formed some sort of opinion. After all the evidence had been received, the judge read them a correct statement of the law of conspiracy, but did not say (doubtless because the mistake was inadvertent) that he was correcting his earlier instruction. *See, e.g. United States v. Egenberg*, 441 F.2d 441 (2d Cir.), *cert. denied*, 404 U.S. 994, 92 S.Ct. 530, 30 L.Ed.2d 546 (1971). The presumption that the second,

correct definition of conspiracy was the only one jurors took with them into the jury room is hardly self-evident

This Court has already ruled on the situation presented by two irreconcilable jury instructions given without correction. *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 85, 85 L.Ed.2d 344 (1985). This case differs in that the conflicting instructions were given at different times. As in *Francis v. Franklin* (and in contrast to *Egenberg*), no correction was made. The jury thus had no indication of which instruction the trial court preferred. Petitioners contend that *Francis v. Franklin* controls this case. The Ninth Circuit distinguishes between *Francis* circumstances and these. If the two are discrete, this Court can and should resolve the situation presented by this case.

B. The Ninth Circuit Defines "Exceptional Circumstances" Differently from Other Circuits.

Because counsel did not object to the disputed conspiracy instruction, the Ninth Circuit reverses only in "exceptional circumstances." Fed.R.Crim.P. 52(b). To assert exceptional circumstances successfully in such a case, petitioners must "prove prejudice or that the jury was materially misled." *United States v. Hegwood*, 977 F.2d 492, 495 (1992), citing *Guam v. Ignacio*, 852 F.2d 495, 461 (9th Cir. 1988).

This proof-of-prejudice standard is more demanding than the standard applied in other Ninth Circuit decisions. *E.g. United States v. Kessi*, 868 F.2d 1097, 1103 (9th Cir. 1989). ("It must be highly probable that the error materially affected the verdict.") It is at variance with the law of other jurisdictions, as well. For example, the Fourth Circuit specifies that Fed.R.Crim.P. 52(b) is to be applied:

> "only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has ' "resulted in a miscarriage of justice or in the denial to appellant of a fair

> trial" ' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' "

United States v. McCaskill, 676 F.2d 995, 1002 (4th Cir. 1982), footnotes omitted, emphasis in original.

Petitioners' case would unquestionably show "exceptional circumstances" under the Fourth Circuit's definition. The instructional mistake invited conviction without the government's having to prove every element of the crime. Surely such a mistake had a "probable impact" on the verdict.

The concept of "exceptional circumstances" has traditionally been a slippery one, and has often inspired an "I know it when I see it" approach. *See, e.g.*, 3A C. Wright, *Federal Practice and Procedure*, Criminal 2d, Section 856 (1982), 1992 pocket part, 335-344. In this case, the Court has a clear opportunity to clarify what is meant by "exceptional circumstances."

II.

THE NINTH CIRCUIT'S DECISION ON THE INTERSTATE COMMERCE INSTRUCTION CONFLICTS WITH THIS COURT'S DECISION IN *SANDSTROM v. MONTANA*

The district court's charge to the jury on 21 U.S.C. Section 843(b) followed the instruction in *Manual of Model Criminal Jury Instructions for the Ninth Circuit* 9.04E, at 278 (1992). The Ninth Circuit correctly concedes that, because it omits the elements of knowledge or intent, this instruction constitutes *Sandstrom* error. *United States v. Hegwood*, 977 F.2d 492, 496.

Immediately after its instruction, the trial court added language which was essentially a *précis* of the statute: "Section 843(b) of Title 21 of the United States Code provides in part that it shall be unlawful for any person, knowingly or intentionally, to use any communication facility in committing or in causing or facilitating commission of any act or acts constituting a felony." *United*

States v. Hegwood, 977 F.2d 492, 495. The Ninth Circuit decided that the result was "less than artful, [but] it is sufficient to inform the jury that they must find knowledge or intent." *United States v. Hegwood*, 977 F.2d 492, 496, footnote omitted. Petitioners respectfully contend that it was not sufficient. The Ninth Circuit pattern instruction, as given by the trial court, enumerated the elements that "the government must prove . . . beyond a reasonable doubt." There were two and only two such elements: "That the defendant used the mail to help bring about the conspiracy to distribute cocaine charged in Count I of the Indictment or that the defendant used the mail to help bring about the possession of cocaine with the intent to distribute charged in Count II." *Id* . This enumeration told the jury in plain English that it could convict on an "A or B" basis. It made no reference to knowledge or intent. Its language was prescriptive. The later reference to the statute was descriptive. The instruction, taken as a whole, still fails the test of *Sandstrom v. Montana*.

The opinion cited no legal precedent on this issue, perhaps because (as petitioners believe) it is a matter of first impression for this Court. This case provides the opportunity for the Court to decide the issue in a direct fashion.

III.

THE NINTH CIRCUIT'S OPINION APPLIED THE LAW INCORRECTLY IN HOLDING THAT THE ADMISSION OF CERTAIN RULE 404(b) EVIDENCE WAS NOT AN ABUSE OF DISCRETION.

Petitioners appeal the admission of two categories of evidence of prior conduct under Fed.R.Evid. 404(b). The admission of this evidence constituted an abuse of discretion. *United States v. Conners*, 825 F.2d 1384, 1390 (9th Cir. 1987). The Ninth Circuit incorrectly applied the law in upholding the trial court's exercise of discretion in each instance.

A. The Government First Raised the Issue of Wilson's Prior Drug Dealings.

"Ordinarily, five-year-old evidence of drug sales will not be particularly probative of intent to sell drugs today." *United States v. Hegwood*, 977 F.2d 492, 496, citing *United States v. Alfonso*, 759 F.2d 728, 740 (9th Cir. 1985). In this case, the District Court held that Wilson's counsel "opened the door" by raising the issue for the first time on cross-examination. In fact, the government asked Witness Brundage on direct examination, "Have you ever purchased cocaine from Fred Wilson before?" She answered that she had. (Volume 3, Transcript of Proceedings, hereafter "RT," 41.) The question was asked and answered with no qualification as to time. Wilson's counsel immediately and properly made a relevance objection. *Id.* This exchange occurred long before Wilson's counsel asked Brundage on cross, "Do you know Fred Wilson to be a drug dealer?" (4 RT, 37.) The relevant excerpts from the Transcript of Proceedings will be found in the Appendix, B-2, *et seq.*

B. Admission of Evidence of Petitioners' Drug Use the Day of and the Night Before Their Arrest was an Abuse of Discretion.

The Ninth Circuit has held that evidence of prior drug use is not admissible under Rule 404(b) to prove a charge of possession with intent to distribute. *United States v. Hill*, 953 F.2d 452 (9th Cir. 1981); *United States v. Mehrmanesh*, 689 F.2d 822 (9th Cir. 1982). Here, however, the Court of Appeals ruled such evidence admissible because it was relevant to intent, knowledge and absence of mistake. *United States v. Hegwood*, 977 F.2d 492, 497.

The precedents cited by the Ninth Circuit are inapposite, because neither involves drug use. In one, an appellant claimed that her husband told her nothing about his drug manufacturing activities. The trial court properly admitted a drug ledger seized from her purse as evidence contradicting this defense. *United States v. Marsh*, 894 F.2d 1035, 1038-39 (9th Cir. 1989). The other did not involve drugs at all. An appellant claimed unfamiliarity with alien smuggling operations. The government was properly allowed to introduce evidence of other incidents in which the

appellant had been involved, and in which he had used a similar *modus operandi*. *United States v. Winn*, 767 F.2d 527, 529-30 (9th Cir. 1985).

Petitioners, by contrast, never claimed that they had never used cocaine, nor that they were ignorant of what it looked like. Their defense, rather, was their ignorance of the contents of this particular parcel. Had the government possessed evidence that petitioners had received similar parcels that had been proved to contain cocaine, such evidence would have been properly admissible. Here, however, the simple fact of use had no relevance to intent or mistake. The jury was allowed to infer that, since petitioners used drugs, they were likely to sell them — an inference that has been held to be improper. *United States v. Mehrmanesh*, 689 F.2d 822 (9th Cir. 1982); *United States v. Masters*, 450 F.2d 866 (9th Cir. 1971), *cert. denied*, 405 U.S. 1044, 92 S.Ct. 1329, 31 L.Ed.2d 587 (1972).

IV.

THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO ADDRESS THE QUESTION OF THE NATURE AND CHARACTER OF EVIDENCE NECESSARY FOR A RATIONAL JURY TO CONVICT ON A CHARGE OF CONSPIRACY.

Evidence suffices to support a conviction when, viewed in the light most favorable to the government, a rational jury could have found a defendant guilty beyond a reasonable doubt of each element of the crime. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Medina*, 940 F.2d 1247, 1250 (9th Cir. 1991).

The question of evidentiary sufficiency is often troublesome in conspiracy cases. Alleged co-conspirators rarely execute written agreements. Evidence is usually circumstantial, and the jury is frequently forced to determine the meaning of ambiguous acts. Such was the case with petitioners.

Neither petitioner discussed receiving cocaine with any witness. It was not the case that "both took physical possession of the

package containing cocaine." *United States v. Hegwood*, 977 F.2d 492, 497. The record contains no evidence that Wilson took possession. Witness Brundage testified that she put the package by the door and went to the bathroom; when she returned, petitioners and the package were gone. Trooper McMillon said that he saw Hegwood carry the package. It was found in the car, behind the passenger seat.

Neither did any evidence establish that "Wilson left Hegwood at the apartment with instructions to wait for the arrival of the package." *Id.* Neither Brundage nor Sherald, the only people who would have been in a position to observe, testified that Wilson gave Hegwood instructions of any sort.

Further, no evidence establishes that, on the package's arrival, "Wilson told Hegwood to take it to Wilson's car." *Id.* There was simply no evidence offered that Wilson told Hegwood anything at all.

On the issue of knowledge and intent, evidence was received that Wilson had sold cocaine on a number of prior occasions, and had brought cocaine with him to the apartment the night before and the day of his arrest. *United States v. Hegwood*, 977 F.2d 492, 498. As argued *supra*, this evidence was improperly received.

Nor was it the case that, when the package arrived, "Wilson acknowledged it as his own. . . ." *Id.* Brundage, the only person there, said nothing about Wilson or Hegwood acknowledging ownership of the package. In fact, she testified that Wilson had never said anything about it.

"When the police approached Wilson's car, Wilson fled. . . ." *Id.* This is true, but his flight may be attributed to his possession of the "eight-ball" in his sock. Ironically, this behavior is consistent with that of an innocent person — that is, a person innocent of the crime for which he was tried in this case. When behavior is consistent with innocence, the government must produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that a defendant is, in fact, engaged in criminal conduct. *United States v. Bishop*, 959 F.2d 820, 831 (9th Cir. 1992); *United States v. Penagos*, 823 F.2d 346, 349 (9th Cir. 1987).

The opinion stated that many of the same facts provide evidence of Hegwood's intent. *Id.* That is also true. And, as with Wilson, Hegwood's circumstances are extremely conjectural. The Ninth Circuit implicitly recognized the role of conjecture in the evidence by its use of "might have brought" and "may have instructed." Our legal system bases convictions on actual, not possible deeds.

Finally, the opinion stated that Wilson "arranged for a package to be delivered to him under a fictitious name at Brundage's apartment." *Id.* There was no evidence offered concerning who mailed the package, or arranged for its delivery.

Taken in total, the evidence legally received in this case could not have convinced a rational jury that both defendants were guilty beyond a reasonable doubt of agreement, intent and one or more overt acts in furtherance. Because the evidence was insufficient to support the conspiracy charge, petitioners' liability on possession and use of the mails counts must also fall when predicated on *United States v. Pinkerton*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). As discussed above, evidence was also insufficient to sustain proof of knowledge of the contents of the parcel by either petitioner. Wilson had no actual possession; any finding of his constructive possession depends on the existence of the conspiracy; and Hegwood, though he held the box, was not shown to know its contents. Accordingly, the possession conviction must fall on this basis, as well.

CONCLUSION

For the foregoing reasons, review by this Court is appropriate and certiorari should be granted.

Respectfully submitted,

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DATED: March 30, 1993

EXHIBIT A

Nos. 91-30189, 91-30204

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
OF THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LAVELL RAY HEGWOOD;
FRED WILSON, JR.,
Defendants-Appellants.

D.C. No. CR-90-094 (JKS)

OPINION

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted
August 19, 1992 — Anchorage, Alaska

Filed October 13, 1992

Before: Procter Hug, Jr., Dorothy W. Nelson, and
Thomas G. Nelson, Circuit Judges.

Opinion by Judge D.W. Nelson

SUMMARY

Criminal Law and Procedure/Conspiracy/Criminal
Acts/Evidence/Juries/Narcotics

Affirming a district court judgment of conviction, the court of appeals held that admission of testimony about appellants' recent drug sales and use was not violative of Fed. R. Evid. 404(b) and properly admissible to prove intent and knowledge with regard to the current sale with which they were charged and rebut their defense of mistake concerning the cocaine contents of a package received by them in furtherance of their conspiracy.

Appellants Lavell Ray Hegwood and Fred Wilson, Jr., were convicted for possession of cocaine with intent to distribute,

conspiracy to distribute cocaine, and use of the mails to facilitate the possession of cocaine. Appellants coordinated their efforts in obtaining through the mail a package containing cocaine. On appeal, both Hegwood and Wilson challenged the sufficiency of the evidence on each of the counts, the district court's instructions to the jury, and that court's admission of evidence of other crimes committed by appellants.

[1] Although in its opening charge to the jury the district court's definition of conspiracy, unobjected to by defense counsel, left out the element of intent to commit the substantive crime as an element of conspiracy, the government argued that any error in the instruction was cured because the district court gave a correct instruction at the end of the trial. [2] Reviewing the instructions given for plain error, the court found that there were no exceptional circumstances present warranting reversal. Where the instruction challenged is given at the beginning of trial, reversal is not warranted absent prejudice to the defendant or proof that the jury was materially misled. Because that was the case here, the district court's error was cured by its subsequent instruction.

[3] Concerning the instruction given on use of the mails to facilitate the possession of cocaine, the district court gave an instruction with language contained in the Manual of Model Criminal Jury Instructions for the Ninth Circuit and then supplemented it by adding language from the statute itself. [4] The court noted that it would have been plain error for the district court merely to read the model jury instruction, because that instruction makes no reference whatsoever to knowledge or intent. However, the district court instructed the jury from the statute itself that appellants' use of the mails had to be knowing or intentional to convict.

[5] The court noted that while five-year-old evidence of drug sales will not be particularly probative of intent to sell drugs today, when a defendant opens the door to testimony about an issue that he raised for the first time himself, he cannot complain about subsequent government inquiry into that issue. Thus, because Wilson's attorney asked a witness if she knew Wilson to be a drug dealer, the government was entitled to introduce evidence about his character in that regard. In addition, the testimony of

two witnesses about more recent drug sales was clearly admissible to prove intent and knowledge concerning the current sale charged. [6] The district court also properly admitted evidence of prior drug use by appellants as relevant to prove absence of mistake or accident in light of appellants' assertion that they did not know cocaine was in a package they received in the mail. [7] The court also held that the evidence was sufficient to convict appellants of each count. The jury could rationally have found appellants guilty beyond a reasonable doubt.

[8] On the conspiracy charge, the court noted that appellants' actions showed a high degree of coordination in receiving the package containing cocaine. This was sufficient evidence for the jury to find an agreement. [9] The court acknowledged that the government presented sufficient facts from which the jury could infer knowledge and intent on the part of appellants behind the conspiracy to receive a package containing cocaine. [10] The court stated that intent to distribute could be inferred solely from the volume of the substance possessed.

[11] On the use of the mails charge, appellants' only challenge to the sufficiency of the evidence was their claim that they did not know what the package in question contained. However, there was sufficient evidence presented for the jury to conclude that appellants knew that the package received contained cocaine.

COUNSEL

Roger J. Rosen, Los Angeles, California, for defendant-appellant Lavell Hegwood.

Ben W. Pesta II, Sandler, Rolnick & Morse, Los Angeles, California, for defendant-appellant Fred Wilson.

Steven E. Skrocki, Assistant United States Attorney, Anchorage Alaska, for the plaintiff-appellee.

OPINION

D.W. NELSON, Circuit Judge:

Defendants Lavell Hegwood and Fred Wilson appeal their convictions for possession of cocaine with intent to distribute and conspiracy to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846, and use of the mails to facilitate the possession of cocaine, in violation of 21 U.S.C. § 843(b). On appeal, defendants challenge the sufficiency of the evidence on each of the counts, the adequacy of the court's opening and closing instructions to the jury, and the court's admission of evidence of other crimes committed by the defendants. We affirm.

I. The Conspiracy Instruction

[1] In its opening charge to the jury, the district court defined "conspiracy" as requiring "an agreement between two or more persons to commit a crime, of which either or both Defendants become a member, knowing at least one of its objects, and at least one member performs at least one overt act to carry out the conspiracy." The government concedes that this statement of the law was inaccurate because it omitted intent to commit the substantive crime as an element of conspiracy. *See United States v. Indelicato*, 800 F.2d 1482, 1483 (9th Cir. 1986). However, the government contends that any error was cured because the district court gave a correct instruction to the jury at the end of the trial.

Defense counsel did not object to the initial charge when it was given. In the absence of such an objection, we review jury instructions for "plain error," and we will reverse only in "exceptional circumstances." *United States v. Marsh*, 894 F.2d 1035, 1039 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990).

[2] Such exceptional circumstances are not present here. Where the instruction challenged is given at the beginning of trial, reversal is unwarranted unless the defendant can prove prejudice or that the jury was materially misled. *Guam v. Ignacio*, 852 F.2d 459, 461 (9th Cir. 1988). Specifically, we held in *Ignacio* that "[b]ecause the trial judge used the correct instruction at the end of trial, and because the correct instruction was the only instruc-

tion given to the jury to take with them to the jury room, it is presumed that the jury followed the correct instruction." *Id.; see also United States v. Hayes*, 794 F.2d 1348, 1351-52 (9th Cir. 1986) (proper subsequent instructions cured erroneous initial charge), *cert. denied*, 479 U.S. 1086 (1987). That is the case here. The district court's error in its initial instruction was cured by its subsequent instruction.[1]

II. The Interstate Commerce Instruction

[3] The district court's instruction to the jury regarding 21 U.S.C. § 843(b) read as follows:

> In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt, that the defendant used the mail to help bring about the conspiracy to distribute cocaine charged in court I of the indictment or that the defendant used the mail to help bring about possession of cocaine with the intent to distribute charged in court II. Section 843(b) of Title 21 of the United States Code provides in part that it shall be unlawful for any person, knowingly *or* intentionally, to use any communication facility

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[1] *Francis v. Franklin*, 471 U.S. 307, 322 (1985), is not to the contrary. *Francis* held that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reading their verdict." *Id.* in *Francis*, the district court gave two *closing* instructions which affirmatively contradicted each other. The jury was therefore left in the position of choosing between them. That was not the case here. The erroneous instruction was cured by the subsequent, more complete closing instruction. The closing instruction did not directly contradict the opening instruction. Rather, if merely gave a more complete definition of conspiracy. It stretches credulity to think that the jury disregarded the instruction they had just been given because it included an element that had not been mentioned earlier.

> in committing or in causing or facilitating commission of any act or acts constituting a felony.

(empahasis added). That part of the instruction which instructs the jury on the necessity of finding that the defendant "used the mail" essentially follows the language contained in the *Manual of Model Criminal Jury Instructions for the Ninth Circuit* 9.04E, at 278 (1992). The district court then supplemented the model instruction by adding language which apparently was derived from the statute itself.

21 U.S.C. § 843(b) provides that "[i]t shall be unlawful for any perosn knowingly *or* intentionally to use any communication facility in committing . . . a felony." On appeal, the defendants object to the instruction on the grounds that it improperly relieves the government of the burden of proving intent. Again, because no objection was raised in the district court, we review the instruction for plain error, and will reverse only in exceptional circumstances. *Marsh*, 894 F.2d at 1039.

[4] Had the district court merely read the model jury instruction, it would have committed plain error, since that instruction makes no reference whatsoever to knowledge or intent. *See Sandstrom v. Montana*, 442 U.S. 510, 521 (1979) (error to relieve government of burden of proving each element of the crime beyond a reasonable doubt). However, the district court went on to instruct the jury from the language of the statute itself that defendants' use of the mails must be knowing or intentional. While the resulting instruction in its entirety may be less than artful, it is sufficient to inform the jury that they must find knowledge or intent.[2] The instruction taken as a whole does not rise to the level of plain error.

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[2]Alternatively, defendants point to a Ninth Circuit case which appears to require the government to prove both knowledge *and* intent in order to show a violation of section 843(b). *United States v. Adler*, 879 F.2d 491, 495 (9th Cir. 1988) (" 'In order to prove a violation of 21 U.S.C. § 843(b), the government must establish knowing and intentional use of a communications facility . . . ' " (quoting *United States v. Phillips*, 664 F.2d 971, 1032 (5th Cir. 1981), *cert. denied sub nom. Meinster v. United States*, 457 U.S. 1136 (1982)). *Adler*, which did not discuss the

III. Evidence of Other Crimes

At trial, the government introduced evidence from witnesses Patricia Brundage and John Sherald that Hegwood and Wilson had used cocaine the night before and on the day of their arrest, that Wilson had sold cocaine to Brundage and Sherald in the recent past, and that Wilson had put Brundage in touch with a cocaine dealer when they first met, some five years ago. Defendants contend that admission of this evidence over their objection violates Fed. R. Evid. 404(b), which provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The district court's decision to admit evidence under Rule 404(b) is reviewed for abuse of discretion. *United States v. Conners*, 825 F.2d 1384, 1390 (9th Cir. 1987).

Evidence of Wilson's conduct five years ago was not introduced by the government during its direct examination of Brundage. However, on cross-examination, counsel for Wilson asked Brundage "Do you know Fred Wilson to be a drug dealer?" Brundage then testified that Wilson had referred her to a cocaine dealer when they first met, five years before. On redirect, Brundage testified about four other people she knew who had purchased drugs from Wilson.

[5] Ordinarily, five-year-old evidence of drug sales will not be particularly probative of intent to sell drugs today. *United States v. Alfonso*, 759 F.2d 728, 740 (9th Cir. 1985). However, when the defendant "opens the door" to testimony about an issue by raising

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elements of knowledge or intent, and was merely quoting a Fifth Circuit case, appears to have misstated the elements of the crime. Both the statute itself and prior Ninth Circuit precedent make it clear that the government need prove only knowledge *or* intent. 21 U.S.C. § 843(b); *United States v. Whitten*, 706 F.2d 1000, 1006 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

it for the first time himself, he cannot complain about subsequent government inquiry into that issue. *United States v. Bailleaux*, 685 F.2d 1105, 1110 (9th Cir. 1982). Because Wilson's attorney asked Brundage about Wilson's character as a drug dealer, the government was entitled to put on evidence about his character. *United States v. Segal*, 852 F.2d 1152, 1155 (9th Cir. 1988). Furthermore, the testimony of Brundage and Sherald about Wilson's more recent drug sales is clearly admissible to prove intent and knowledge with regard to the current sale. *See, e.g., United States v. Mehrmanesh*, 689 F.2d 822, 832 (9th Cir. 1982); *United States v. Sinn*, 622 F.2d 415, 416 (9th Cir.), *cert. denied*, 449 U.S. 843 (1980).

[6] There remains defendants' objection to the evidence that they had used cocaine the day of and the night before their arrest. Ordinarily, we have held that evidence of prior drug *use* is not admissible under Rule 404(b) to prove a charge of possession with intent to distribute. *See United States v. Hill*, 953 F.2d 452, 456-58 (9th Cir. 1991); *Mehrmanesh*, 689 F.2d at 831-32. In this case, however, the evidence was relevant to two issues other than character. First, the defense theory at trial was that the defendants did not know what was in the package. Evidence of prior involvement with drugs is relevant to prove absence of mistake or accident in this circumstance. *See Marsh*, 894 F.2d at 1038-39 (drug paraphernalia admissible to contradict defendant's claim that she was uninvolved in her husband's drug sales); *United States v. Winn*, 767 F.2d 527, 529-30 (9th Cir. (1985) (prior conviction for smuggling aliens admissible to prove defendant's familiarity with alien-smuggling operations).

Second, both Brundage and Sherald testified that Wilson brought the cocaine which all four smoked the day of the arrest, and Brundage testified that Hegwood may have brought the cocaine the night before. We have consistently held that evidence of prior possession or sale of cocaine is relevant under Rule 404(b) to issues of intent, knowledge, and absence of mistake or accident in a prosecution for "possession of, important of, and intent to distribute narcotics." *Mehrmanesh*, 689 F.2d at 832, *Sinn*, 622 F.2d at 416. Thus, the evidence of Wilson and Hegwood's drug use immediately prior to their arrest was admis-

sible both as proof of prior possession and to rebut their defense of mistake.

IV. Sufficiency of the Evidence

[7] Both Wilson and Hegwood challenge the sufficiency of the evidence to convict them of each count. The evidence is sufficient to support a conviction as long as, viewing the evidence in the light most favorable to the government, a rational jury could have found the defendants guilty beyond a reasonable doubt of each element of the crime. *United States v. Medina*, 940 F.2d 1247, 1250 (9th Cir. 1991).

A. Conspiracy

Conspiracy has three elements: agreement to accomplish an illegal objective; one or more overt acts in furtherance of that objective; and the intent to commit the substantive offense. *United States v. Disla*, 805 F.2d 1340, 1348 (9th Cir. 1986). In this case, the overt acts on the part of both defendants are clear — both took physical possession of the package containing cocaine. Both Hegwood and Wilson challenge the existence of an agreement and the proof of their intent, however.

[8] An agreement may be proven by circumstantial evidence that the defendants acted together with a common goal. Express agreement is not required; rather, agreement may be inferred from conduct. *Disla*, 805 F.2d at 1348. In this case, Hegwood and Wilson's actions showed a high degree of coordination. They arrived together at Brundage's apartment, apparently with the common purpose of picking up Wilson's package. When the package did not arrive, Wilson left Hegwood at the apartment with instructions to wait for the arrival of the package. Although the package was theoretically addressed to Wilson, Hegwood was the one who described its supposed contents to Brundage and Sherald. Finally, after concluding that the package would not arrive, Hegwood called Wilson to pick him up. When the package did arrive, Wilson told Hegwood to take it to Wilson's car. Hegwood did so, and then waited in the car to leave with Wilson. The high degree of coordination between Wilson and Hegwood is sufficient evidence from which a jury could find agreement.

United States v. Hernandez, 876 F.2d 774, 778 (9th Cir.) (coordination between defendants is "strong circumstantial evidence of an agreement"), *cert. denied*, 493 U.S. 863 (1989).

[9] Defendants argue that the government failed to prove intent because there is no proof that either defendant knew what was in the package. Knowledge of the purpose behind the conspiracy is an essential element of the crime, and evidence of knowledge must be "clear." *Medina*, 940 F.2d at 1250. The mere presence of a defendant in suspicious circumstances is not enough to imply knowledge. *United States v. Ocampo*, 937 F.2d 485, 489 (9th Cir. 1991). In this case, however, the government has presented sufficient facts from which the jury could infer knowledge and intent on the part of both Wilson and Hegwood.

Wilson had sold cocaine on a number of prior occasions, and had brought cocaine with him to Brundage's apartment both the night before and the day of his arrest. He waited for a mail package (or had Hegwood do so) continuously for two days at Brundage's apartment, even though Sherald or Brundage were there almost the entire time and could have received the package for him. When the package arrived, Wilson acknowledged it as his own and either he or Hegwood instructed Brundage to sign for it, even though it was addressed to a nonexistent Julie Richardson. He then instructed Hegwood to take the package, which had been mailed from a "Book Store" even though it supposedly contained court transcripts relating to his child custody dispute, and the two immediately left the apartment. When the police approached Wilson's car, Wilson fled and was apprehended outside the door of Brundage's apartment.[3] Taken together, there is ample evidence that Wilson knew that the package contained cocaine and intended to receive that cocaine.

Many of the same facts provide evidence of Hegwood's intent. Hegwood arrived with Wilson, and stayed for two days waiting for

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[3]A defendant's flight is evidence that he knows his conduct is illegal. *United States v. Chambers*, 918 F.2d 1455, 1458 (9th Cir. 1990). While Wilson's flight is consistent with the defense's theory — that he fled because he was carrying 1/8 of an ounce of cocaine in his shoe — it is also consistent with guilty knowledge of the contents of the package.

Wilson's package. He claimed that the package they were waiting for belonged to Wilson and contained court transcripts. Nonetheless, he recognized and picked up the package even though it was addressed to "Julie Richardson" and even though it was sent from a "Book Store" in California. He then carried the package to Wilson's car, and waited there for Wilson. In addition, there was evidence that Hegwood might have brought cocaine with him to Brundage's apartment, and that he may have instructed Brundage to sign for the package addressed to "Julie Richardson." Given the suspicious nature of the package and the actions of both defendants, and the close coordination between them, a rational jury could find that they conspired together to receive cocaine.

B. Possession

Possession with intent to distribute cocaine requires that the government prove (1) actual possession, dominion or control of the cocaine, (2) knowledge that the substance is cocaine, and (3) intent to distribute. *See United States v. Behanna*, 814 F.2d 1318, 1319 (9th Cir. 1987); *United States v. Batimana*, 623 F.2d 1366, 1369 (9th Cir.), *cert. denied*, 449 U.S. 1038 (1980). Co-conspirators are jointly liable for the acts of any conspirator done in furtherance of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946).

[10] In this case, defendants concede that Hegwood was in actual possession of the package. As discussed above, there was sufficient evidence for the jury to find that Hegwood and Wilson knew the package contained cocaine and conspired together to possess that cocaine. Intent to distribute may be inferred solely from the volume of the substance possessed — here, approximately three kilograms. *United States v. Valentin*, 569 F.2d 1069, 1071 (9th Cir. 1978). As co-conspirators, both Hegwood and Wilson are therefore liable for possession of cocaine.

C. Use of the Mails

[11] 21 U.S.C. § 843(b) makes unlawful the "knowing or intentional use of a communications facility" to facilitate a felony. Here, it is unquestionable that Wilson made "knowing or intentional use" of the mails, since he arranged for a package to be

delivered to him under a fictitious name at Brundage's apartment. Wilson clearly knew several days in advance that the package would be arriving there, since he asked Sherald for permission to receive a package at the apartment. Defendants' only challenge to the sufficiency of the evidence for this count is their claim that they did not know what the package contained. As noted above, there was sufficient evidence for the jury to find that both defendants knew that the package contained cocaine. There is therefore sufficient evidence to convict Wilson (and, under *Pinkerton*, co-conspirator Hegwood as well) of using the mails to facilitate the commission of a felony — possession of cocaine.

CONCLUSION

The convictions of Wilson and Hegwood are affirmed.
AFFIRMED

EXHIBIT B

Nos. 91-30189, 91-30204

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

LAVELL RAY HEGWOOD;
FRED WILSON, JR.,
Defendants-Appellants.

D.C. No. 90-094 (JKS)
Stamp Filed Jan. 7, 1993

ORDER

Before: HUG, D.W. NELSON and T.G. NELSON, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 355.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Pursuant to Sup.Ct.R. 14.1(h), petitioners submit the following verbatim excerpts from the official Transcript of Proceedings, cited in the text of this petition as "RT":

Q Did you purchase cocaine on that day?

A No.

Q Have you ever purchased cocaine —

A Yes

Q — from Fred Wilson before?

A Yes.

Mr. BUTLER: Objection as to relevance.

THE COURT: I'll allow you to tie it in, counsel.

Q Do you recall when that was

A What, the date?

Q Appro — well, let — let me start with this. How many times have you purchased cocaine from Fred Wilson before?

A Twice, maybe more, I'm not quite . . .

THE CLERK: I need you to speak louder, please ma'am.

A Maybe twice, or so, I'm not — I'm not quite sure.

Q Do you recall how much you paid for it?

A Between $100 and — $100 and $250, depends on what you ge- — what I got.

3 RT, 41-42

Q Now isn't it true that you do not know Fred Wilson to be a drug dealer? Yes or no?

A Do I consider — do I know?

Q Do you know Fred Wilson to be a drug dealer?

A I've bought drugs from him, so I don't know whether that makes him a drug dealer or not.

Q Do you know Fred Wilson to be a drug dealer? We're all waiting for your answer.

A Yes. He sold me drugs. But I don't know whether he was a drug dealer, no.

Q You don't know —

A I —

Q — or yes.

A I don't know whether he was a drug dealer or not.

4 RT, 37

The defendants are charged in count III of the indictment with illegal use of a communication facility, the United States mail, in violation of section 843(b) of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt. Doubt, that the defendant used the mail to help bring about the conspiracy to distribute cocaine charged in count I of the indictment or that the defendant used the mail to help bring about possession of cocaine with the intent to distribute charged in count II. Section 843(b) of Title 21 of the United States Code provides in part that it shall be unlawful for any person, knowingly or intentionally, to use any communication facility in committing or in causing or facilitating commission of any act or acts constituting a felony.

6 RT, 93-94

STATUTES AND RULES INVOLVED

18 U.S.C. Section 2 Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

21 U.S.C. Section 841(a)(1) Prohibited acts A

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .

21 U.S.C. Section 843(b) Communication facility

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. . . .

21 U.S.C. Section 846 Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Fed.R.Evid. 404(b) Other crimes, wrongs, or acts [Effective until Dec. 1, 1991.]

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.